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ABSTRACT

This document on the Civil Rights of Students, perpared by the Educational Opportunities Planning Center, provides a synthesis of presentations made by the author and of the three discussion and answer sessions that followed at the three meetings of the School Law Conferences. Opening remarks emphasize the need for educators to respond to demonstrations of student dissent which stress the rights of individuals both inside and outside of school. Groups that advocate for students rights, among them the American Civil Liberties Union, are cited in relation to their position on key issues in this area. Noting that most violations of student rights have concerned due process, minimum standards that satisfy requirements in this area are listed. The development of handbooks describing what students can do and what administrators should do, the formation of parent ombudsmen as go-between administration and students, and a student board of inquiry are some of the innovations undertaken by the Center for the Study of Student Citizenship, Rights, and Responsibilities, in Dayton, Ohio, which is under a federal OEO Grant to develop a model for students rights advocacy. These, along with a presentation of some cases handled by this center during its first year of operation, are discussed. Questions addressed covered specific areas such as an athletic coach's control over student hair length, in-school suspension, confidentiality of school records, right to counsel, and broader topics. Among the broader topics were rights vs. privileges, student responsibility for his education, and what constitutes an education. (AM)

THE CIVIL RIGHTS OF STUDENTS

by

Larry W. Hillman

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EDUCATIONAL OPPORTUNITIES PLANNING CENTER

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THE CIVIL RIGHTS OF STUDENTS

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This is a synthesis of presentations given by Dr. Hillman, and of the question and answer sessions which followed, at the School Law Conferences held at Knoxville, Tuesday, March 28; at Memphis, Wednesday, March 29; and at Nashville, Thursday, March 30.

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THE CIVIL RIGHTS OF STUDENTS

Opening Remarks

I am going to discuss with you today the matter of student rights and responsibilities. I don't think we can separate student rights and student responsibilities, but I'd like to start off with this particular point: Students may not always be right but they should always have rights. With this approach some new terms have crept into our vocabulary, some of which are terms used daily by my law friends but not by school administrators. These are terms such as: burden of proof; civil liberties; class action; consented search; due process; equal protection; First Amendment or Fourteenth Amendment cases; First or Fourteenth Amendment rights; freedom of expression; human rights; legal parity; presumption of innocence; preponderance of evidence; prior restraint; probable cause; rule of law; tort (which we have heard for a good period of time); and "beyond a reasonable doubt."

These are new terms that we see even students using today. If you don't believe this, let a student who has read and kept up with his rights confront you and read to you the law cases relative to his rights, and you'll realize that we're in a new kind of ball game. Our young people are conscious of the law today in a much more personal way than you and I ever were!

I would like to display my confidence in the youth of America today and, if you will permit me, for the time I'll share with you today I'd like to be an advocate of student rights. I'd like to be an advocate of

student rights because I realize that there are advocates for different segments of our society, and it is generally accepted that within school settings every segment of the population has clearly expressed the need for some kind of advocate. Teachers and administrators have their professional organizations or unions, clerical and custodial personnel have their unions, and parents usually present themselves adequately, or move quickly, when warranted to seek legal support. But students more often than not must speak for themselves and often may not be heard.

I would like to make reference to two quotes from recent publications I have read, both of which I think we ought to pay some attention to. One is from an article entitled, "I Saw America in the Streets," in a book called A High School Revolution. David Romano, a student, said, to paraphrase a bit, that:

> "We students are waking up to realize our own capacity to govern ourselves, and we don't need the remote principals to tell us what to do, for after all who knows us better, they or ourselves?
>
> "I think students should be equal to that of any other participating group in the school, including teachers and administrators. I think students should be given a voice in the choosing of curricula. Students should be able to influence the assignment of teachers to different courses. I think students are in a much better position than anyone else to decide which teachers are suited for which course. Assignments made on this basis would probably result in student interest determining which teachers were hired and fired. Critics of student power claim that students are not responsible enough to make such critical decisions, and that such evaluations of teachers would deteriorate into popularity contests. Well, I don't believe this would be the case, but even so it still would be better than what we have today. If a student at least had a teacher whom he likes he would go to class and most probably learn something."

The fellow who had these feelings about the school was eighteen years of age.

I would also like to quote to you from some material that came out of a recent newspaper. This material was relative to student involvement, and it was in one of the papers in the North. It said:

> Excessive use of corporal punishment, suspension for ridiculous reasons, expulsion for ridiculous reasons, and the harrassment of children who refuse to conform to the system's model of a perfect student is willful torture and torment. Also, keeping a child at school seven hours a day, and forcing him to listen to his teacher who has nothing relevant to teach him, is cruel punishment. Criminal action should be directed against school administrators rather than school boards, because it is the administrator who misleads the lay people serving on the school board into approving procedure that is faulty.

The person who expressed these feelings is an educator and is at present the director of a center for student rights.

As we have learned, when students are ignored and feel a serious denial of their rights, they have ingenious ways of getting our attention. They disrupt classes and the general operation of the school. They vandalize property and terrorize teachers and administrators. Such behavior on the part of the students is usually avoided when we're responsive to the serious concerns of young people. I believe that we as educators should be very responsive to demonstrations of student dissent which emphasize the rights of individuals both in school and outside of school.

There's another point to be made. Today, those who claim rights are being required to recognize rights of others. A man's right to control other men is being challenged. A man's right to make his own decisions and to act on them is being recognized. However, the shift from

external to internal control is difficult, because of every new right a person gains for himself, somebody else has to yield up the authority to tell him what he must or must not do. I'd like to emphasize that point. You see, in the process of negotiating rights, we must understand that if you have the power you are constantly in the process of giving it away. If you're negotiating, you're constantly in the process of giving away what you have--if you already have the power. Out of the current struggles, a more balanced concept of rights is emerging. The line which delineates where one man's rights end and another man's begins is being drawn more nearly in the middle between them instead of far to one side.

Margaret Mead has said that the young people of today have had experiences which no adult had at the same age and that, consequently, young people are seeking a new and more meaningful relationship with adults. Students now reject the idea that all of their experiences have to be chosen by or must meet the approval of adults. They are demanding the freedom to use their rights to determine the direction of their own existence. There is clear evidence that young people have contributions to make in school and society, and that they demonstrate responsibilities when in an atmosphere of freedom.

The notion that students have constitutional rights which the school cannot infringe upon is no whim of the moment. It is firmly rooted in the law. I will not go into all the law cases, but I will refer to one that I think was the granddaddy of all of this: the West Virginia Board of Education v. Barnett in 1943. That case made it clear

that compulsory school attendance did not mean students surrender their rights at the schoolhouse door. The courts declared that the Fourteenth Amendment protects the citizen against the state itself and all of its creatures, including the Board of Education. The Board of Education has, of course, important, delicate, and high discretionary functions, but none that it may not perform within the limits of the Bill of Rights. The decision in this particular case has since been the basis for most decisions in this area of the law. The Tinker and Gault cases which refer to the First and Fourteenth Amendments to the United States Constitution, and clarify the rights of students, are examples. They all relate back to West Virginia Board of Education v. Barnett.

Now, if I could deviate for just a little while and get onto some points that were missed this morning by the keynote speaker, I would like to tell you what some groups are saying relative to student rights. There are advocates today for student rights other than just myself. Centers which advocate student rights are being developed in places around the country. Some of these centers are being funded by Federal Government, but some are funded from private sources. One of the centers that I have had an opportunity to work with is called, "The Center for Student Rights and Responsibilitites," and is in Dayton, Ohio. It maintains, as I do, that a right is no good unless a person understands the responsibility that goes with it. Another group I am thinking of is the American Civil Liberties Union. The ACLU has been an advocate for rights, period, basically under the First and Fourteenth Amendments. The American Civil Liberties Union has said that students should have the following

as their rights:

1. The right to adequate notice of rules and regulations and the penalties which may be imposed for regulations thereof.

2. The right to a fair hearing prior to suspension, expulsion, transfer or other serious sanctions.

3. The right to counsel at all disciplinarian proceedings which may have serious consequences. Those who cannot afford counsel should have the right to counsel.

With regard to the right of students to counsel, I might say from working with administrators and knowing how we have approached some things in the past, that a student is usually considered guilty almost when he enters the principal's office. Some of you might say to me, "That's not true!" Well, I remember it being true when I was an administrator. I know when you get into the kind of situation where you want to find out something and you do not have all day, a week or month and you don't have the necessary support personnel to be able to go out and get this information together for you, it is much easier to say to a student, "Why did you do it? I have caught you now. Why did you do it?" I also remember that when I was growing up as a kid in Jenkins, Kentucky, I had a principal--a great big fellow--who I thought was about six feet and three inches, or something like that at least. He looked that big to me when I was a kid. He always wore the longest ties I have ever seen. He would always talk loudly and I knew when I went to his office that I was the disadvantaged. I found out later on that it was much easier on me if I were to admit to doing something, even if I didn't do it, because then he would give me amnesty. Amnesty was much better than going through the

process of finding out what I had done. And he usually knew some things, too, about what I had done and that made it worse. Certainly the process of providing counsel to students would be difficult for administrators. (Can you imagine a student saying, "I'd like to call in counsel for this," or a principal saying, "You have the right to one telephone call." It might sound a little weird, but it could occur in the first grade.)

Continuing with what the ACLU says should be rights of students, they have

> 4. the right to confront the evidence against them, including the right of parents to sit any time and challenge the records kept by the school on their children;
>
> 5. the right to confront complainants, the right to call friendly witnesses, and the right to cross-examine hostile ones;
>
> 6. the right to an impartial hearing examiner, such as those of poor teachers facing dismissal;
>
> 7. the right to an effective appeal from the decision of a disciplinary hearing, including the right to a transcript;
>
> 8. the right to be free from forced self-incrimination;
>
> 9. the right to be free from arbitrary and general searches;
>
> 10. the right to be free from illegal use of police by school officials as an adjunct to their own authority in the absence of crimes or threat of crime.
>
> 11. They--and their parents--should have the right to file and cross-file complaints against school officials before an independent panel which is not made up of school personnel.

Unfortunately, school administrators and teachers in many instances have chosen to cling to authoritative practices that infringe on student rights and show little regard for the Constitution or state

education codes. Generally, student rights have been abused by denial of: (1) privacy; (2) a student's right to be heard in cases of suspension or expulsion; (3) freedom from search and seizure; and (4) a recognition of personal dignity and worth. A student's right to privacy has been tested in cases of grooming and appearance. In such cases, the recent attitude of the courts has placed a substantial burden of justification on the use of grooming and dress codes, considering a person's choice in the matter of personal presentation.

Last year I was doing a workshop in Jacksonville, Florida, and during that workshop I saw that Judge William McRae was hearing a case that day involving the length of a student's hair. I suggested to the group--we had about 100 principals and administrators there--that we get the time the hearing was scheduled and go over to hear what the Judge had to say. I had a feeling, from knowing Judge McRae, and from the fact that just two days before a case had been heard in Miami or Dade County relative to the same kind of thing, that it was going to be an educational experience. And it was, because here was a student who had been thrown out of school because of two things: (1) he was under <u>suspicion</u> of having had drugs in his locker; and (2) his hair was too long. Suspicion--nothing proved--but he was thrown out of school on that. Just as an extra thing, he was also thrown out because his hair was long. When he heard the case, the Judge was very brief and to the point. He asked the counsel for the boy who was thrown out of school, "Are you aware of the decision that was made in Dade County about two or three days ago?" The boy's counsel said that he was aware of the decision

and that the Judge could proceed with that knowledge. Later on in the proceedings the Judge asked the principal of the school if, in his estimation, the student caused an upset of the natural or normal operation of his school. This was a very key question. The principal had to answer that he did not. After that, the Judge said, in effect, "Get this young man back in school immediately." He also directed the principal to pay the costs to the parents for having to bring this kind of a thing into court. He went on to say that it is not the responsibility of the school to determine social postures, but that it is the responsibility of the school to educate the children.

In a case in California, there was a student who was in a freshman math class who was failing, and his parents were so notified by the teacher. In this particular situation, the parents went to the school and talked to the teacher. The teacher told them that unless the student got some help he would fail the course. The parents asked the teacher if he would fail if they left the student in the teacher's course and the teacher said, "Yes." So the parents took him out of that course and got him a private tutor. The tutor worked with the student for the remainder of the year, and when the student came back at the end of the year he took the final exam and passed it. Whereupon the parents promptly took the teacher into court, and they collected $284.00 for the cost of the tutor, because the judge found that the student had a <u>right</u> to this education under the laws of the State of California, and that he had been deprived of that right because the school did not say that they were

going to fail him. Rather, they said they were going to educate him. Therefore, the teacher had to pay the $284.00, which was the cost of the education the judge felt the teacher should have been giving to the student under the normal contract. [It would be interesting to speculate on what the judge would have decided had the student failed the final exam after having been tutored.]

It was an interesting kind of direction for one to take. One might wonder about who will be next, because if you consider the normal line of accountability, it was the principal who allowed this to happen (hired the teacher, etc.), and it was the superintendent who hired the principal, and you can go on and on, so everybody was in quite a bit of an uproar to find out where it would go from there.

Perhaps our most flagrant disregard for student rights has been in the area of due process. The Supreme Court ruling in the Gault case clearly established the student's right to due process. As a minimum, the student has a right to receive advice in deriding charges against him with a summary of the evidence on which the charges are based, along with a formal hearing at which he and his parent or guardian may be represented by counsel with a right of cross-examination and a reasonable time in which to prepare the defense. Different states have moved different ways in implementing this decision. Many states have recognized a need and developed handbooks for what students can do and that the administrator should do.

After a series of test cases, many initiated by the American Civil Liberties Union and its various affiliates, schools are being forced to

permit more freedom for students. School administrators and teachers are realizing (often grudgingly) that decisions affecting student rights can no longer be made arbitrarily. Many decisions need student involvement and students must have a share in the responsibility for implementing decisions that result from their involvement.

Along this line, it's interesting to note that Massachusetts has just (in February or March of this year) adopted a law requiring all of its high schools to have a five-member student advisory council to the principal. Now some of you will say very quickly, "That's not new! We've had student councils for years." But in writing this particular law, the legislature pointed to the fact that student councils had not been successful largely because student councils had been looked upon as being an instrument of the administration, with an in-between faculty sponsor responsible to the administration for getting things done in the council. I remember that when I was a principal I had an adviser with the student council. He was the in-between person. After a student council meeting was over, the adviser would come to me and tell me what they talked about, and ask me what I thought we should do. The position I used to take was very clear: "It's my job that they're talking about so I have to make the final decisions relative to that. When I get out on the limb, they're not going to be there when I start to fall."

The law in Massachusetts says that it should be a student advisory council which has right to be heard by the principal, and to give advice to the principal and to the board of education. In other words, the law deliberately increases the possibilities of students being heard by the school administration.

I'd like to stop here for just a second and tell you about a student rights center that I have had the opportunity to work with and for, and then I'm going to back off and hit some cases that are in areas which you deal with. After that we'll get to questions.

The student rights center that I refer to is the one in Dayton, Ohio, which is under a federal OEO grant to develop a kind of model for students rights advocacy. The center has a staff of about 14 people. They do not exist within the framework of the school, but rather they exist almost as a burr under the saddle of the school to keep it moving and considerate of different directions. The center has developed a Handbook which tells the students, in a way that I don't necessarily agree with, what the problems in student rights might be. It deals with the areas of student expression, school discipline, counseling, physical punishment, police in the schools, marriage and pregnancy, verbal abuse of students, right to an education, and arrest. Every student has his own copy of the Handbook.

You might want to write and get a copy of the Handbook because it might be helpful to just look at as background. Each time an area comes up, like school discipline, it will be footnoted in the laws of the different states and by the particular court cases which have been decided that will relate to this area. It's called The Student Rights Handbook for Dayton, Ohio, and you can get it through The Center for the Study of Student Citizenship, Rights and Responsibilities, 1145 Germantown Street, Dayton, Ohio 45408. It is free.

This particular center also has a group of parents which they call ombudsmen. An ombudsman is a go-between in the process between the principal and the student, and the parents, of course. The center will put one of its ten ombudsmen on a case when requested to do so by a student. The ombudsman will hear the case from the student and will then go in and meet with the principal and the student. The center also has a lawyer who will hear the case before it goes any further. If he thinks it will be litigated, i.e., taken into court in any way, then he will proceed accordingly.

It's kind of an interesting process; it's a center that advocates for students. The Handbook also lists the names of the superintendent of the school, the assistant superintendents, the school board members, and their addresses and telephone numbers. It also identifies people at the national level one might call who could be helpful.

The center has done another interesting thing. It has developed a student board of inquiry composed of 10-15 students who look at the law with lawyers in a particular area of student rights and responsibilities. They then call in teachers, superintendents and other "experts," and ask them questions in the area to find out what they think should be the rights of students in that area. The proceedings are videotaped and the students study the tapes as they formulate a statement to the state legislature on what the student rights should be in that area. It's quite interesting. I remember being asked the question, "What is an education?" Fortunately, the superintendent was asked that just before I got there and I didn't look so bad because he didn't know the answer

either. But the students wanted to know, "Can you tell us what an education is?" One student said, "High school is a place they keep you for four years to make sure you stay away from doing what you want to." We had a great rebuttal for that, but it was quite interesting that a student felt that way. He is a very bright man.

I think that the student right center is coming up with some things we might want to look at. It has collected some data during its first year of operation about the source of most of the cases which come to its attention. Sixty-five per cent of the cases that it studied involved suspensions from school for some reason (in Ohio you can suspend a student for up to ten days with justified reasons and notification to the parents). Fifteen per cent of its cases involved corporal punishment, ten per cent were concerned with expulsion from school, and ten per cent were in the areas concerned with the school program, e.g., inadequate counseling by the school counselor (in other words, not telling the student some of the things he needed to know), selection of curriculum, and promotion and grading.

There are some other kinds of cases which I think might be useful for us to consider. One that I remember seeing involves payment of work-study students. You know, there are all kinds of federal contracts today with which you can hire students. The federal grant will provide so much money for this purpose, but the school has to throw in a good sum to be able to make it happen (i.e., the school must "match" the federal money). In two or three cases I know about, schools were getting so much from the Government and that's all they were paying the students.

The local contribution was not being made. The students had to work for that until someone went into court and showed that even though the minimum wage was $1.60 per hour in that particular area, the school had been paying them only $0.50 per hour. The school was actually saving $1.10 for every hour of student work. The judge discussed this with the people and the students got backpaid for the time they had worked. It's a key area; you might wish to look at your own situation to see if you are liable for a lawsuit in this area.

The process of expulsion and/or suspension is one in which there must be ample notification. It's very easy in the expulsion/suspension process to not notify the proper people, although one might ask, "How can you miss notifying the proper people in schools?" I consistently maintain that the schools should have an attorney who could advise on due process in expulsion/suspension cases.

I remember an interesting case involving suspension. The student had been suspended three times. When he was allowed back in school after the third time, he was given a kind of special treatment. He was not allowed to go to lunch, but he was allowed to bring money and the teacher would go buy his lunch and bring it back to him. In the process, the teacher repeatedly told him that he was a "bad boy." When the case was taken into court, the judge made it clear that the special treatment the student was receiving was not giving him the privileges that he should have in the educational process. Was lunch an educational activity? The judge said that the precedent had been set many times--that it is an educational activity and so the school was depriving the young man

of part of his education and it could not deny him that right. Also, it was defamation of character when the teacher was telling the student he was a "bad boy." When the judge told her that it would cost her some dollars if she continued that posture, she naturally backed off quite rapidly. The judge also noted that if a school did not consider the lunchroom activity to be an educational experience, then teachers were not needed to sit with students in the lunchroom. Non-professionals could do that job if it was needed.

Suspension for absences is another very interesting area. Suppose a student is absent and then gets suspended for being absent. A school can suspend students, but it must clearly identify in the suspension process the kind of action the suspended student is going to be involved in to develop him so that he might not again engage in the same kind of activity which got him suspended in the first place.

Another area that comes up time and time again is recommendation for college. Whom should a school recommend for college? Should a school be involved in recommending people for college. Should a school say this student can make it, but that student can't? Schools get hung up on this, and I don't think they should make decisions about who to recommend. Rather, a school should say what the student has done in that particular school so far. Perhaps the school should refer the college to some exam that the student has taken which the college staff can use to figure out whether the student has the capability to succeed in that particular college. This is a very key area in student rights law today.

The graduation exercise is another area of legitimate concern today. There are numerous situations where people have been taken out of a graduation line because of some kind of disciplinary action. The question is whether graduation is a natural part of the educational process or an additional kind of activity. In one case, the judge determined that it was part of the natural educational activity, not extra-curricular in nature, and so even if the student had been bad he could have been punished in other ways. The judge said you could not deprive him of the opportunity to get his grades, to get his credits, or to participate in graduation. He maintained that one cannot go back and recreate a graduation, i.e., one can't graduate again. Graduation is an educational opportunity and the school must let the student become involved in it. The school could decide what to do about the discipline later. This was an interesting line of reasoning.

Two other key points are worth mentioning--those concerned with smoking and hair. I guess that today when we talk about smoking we get into an area which involves one's health. Then, too, we tell students that they cannot smoke in schools, and yet we have teachers' smoking lounges (which sometimes look quite like boiler rooms).

One school I know of took the position that a student would be suspended the first time he was caught smoking, but the second time he would have the choice of either being expelled or attending a hospital smoking clinic. If he decided to he could simply be expelled from school. Now, it's not easy for many students to say they "want out," i.e., they want to be expelled, so the natural option for most students

in that school was to attend the smoking clinic. The smoking clinic was from 7:00 o'clock to 8:30 in the evening. In one particular case the student was caught, suspended, and on his own without any knowledge of the principal, attended the smoking clinic because he wanted to find out about it. Nevertheless, he got caught again later on in the second semester, and was given the opportunity to either be expelled or attend the smoking clinic. He told the principal that he had already attended the smoking clinic and it didn't help him. The options given to him were either to attend the clinic again and be twice as good, or to be expelled. Well, he said that he would rather not attend it then, but would attend it later on. The principal said he would make sure that the student would not receive any grades or credits until he attended the smoking clinic.

Well, there are several things of importance in this case. First of all, the student was suspended when he was caught smoking the first time. He was suspended <u>until his parents came in</u>. Only when the parents came in would the principal allow him back in school. In this particular case, the parents did not come in with him and he was out for a long period of time. The court says clearly that one cannot be suspended for an indefinite period of time. There has to be a definite period of time for which one is suspended. In Tennessee the time is three days. The second thing is that the school withheld grades from the student. The judge in the case made the point that the school could not withhold grades unless they had some clarification in their policies of the relation of the punishment to the crime.

The last two cases I've mentioned involve the right to an education and to due process. The school authorities in this last case believed that the activity was laid out so clearly that the student did not have a right to due process. He was caught smoking, and he was punished. But did the punishment fit the crime? Is it reasonable to deprive one of an education because he is caught smoking? What is right? What is reasonable? Students have the right to privacy beyond the school and in this particular situation the judge maintained that the student did not have to attend the activity in the evening because he had the right to privacy beyond the school hours. If the activity, i.e., the smoking clinic, had been held during the school day, then the situation would have been different. The school could then let him go during a study hall, or at some set time during the day, because if one believed the smoking clinic to be an educational activity, one should have set it within school hours. The school authorities could have asked the hospital to come and provide the clinic during school hours. [One might ask, of course, what alternative there would be if the hospital had refused to provide a clinic during school hours.]

The last area of student rights I will discuss involves the way students wear their hair. Many hair cases have been litigated over the years but to my knowledge no hair case has as yet gone all the way to the Supreme Court. Cases involving hair have usually been held in lower courts of law. Basically, unless one's hair is in some way dangerous; or in some way disruptive of the normal activity of the school; or if there is some kind of activity in which the school feels one cannot

participate because of the length of his hair, and denies him the right to participate because of that, then the rules are clear. It is not the school's responsibility to determine those things or to deprive one of an education just because the school doesn't want long hair on boys. A person can learn with long hair and learning is what it is all about.

In closing these remarks, I should like to say that I believe, if it is not already too late, every elementary and secondary school in America should dedicate itself to the task of helping every boy and girl learn the meaning of rights and responsibilities as a human being, and to learn respect, dignity, freedom and responsibility. Let us begin to operate our schools on the premise that responsibility cannot be learned in the absence of freedom. Let us being to help children to learn from our deeds as well as from our words. Let us help them learn that freedom and justice can only exist for us if we protect these rights for others. And I believe we learn to honor these rights only if we are ablt to see the consequences of our own acts.

QUESTION AND ANSWER SESSIONS

The following is a synthesis of the three discussion and answer sessions following Dr. Larry Hillman's presentations at the three conferences. In addition to Dr. Hillman, questions were fielded by Dr. Larry Hughes, who coordinated the sessions and moderated the discussions; Mr. Forrest Lacey, College of Law, The University of Tennessee, Knoxville, who attended the Knoxville Conference only; Mr. Carr Lowrance, a law school graduate and a member of the Title IV Center staff of Mississippi State University, who attended the Memphis session only; and Mr. Joseph Cook, College of Law, The University of Tennessee, Knoxville, who attended the Nashville session only.

Comment by Mr. Forrest Lacey

The law is a process rather than the mathematical formula kind of thing. You don't feed a set of facts into a computer and come out with the predetermined legal conclusions. As a school administrator, you go to your lawyer and ask him what the law is in a particular situation. It is going to be a very rare situation when he can tell you what it is. The lawyer won't be able to tell you precisely what the law is in that particular situation, because the law isn't so predetermined. Each judge has considerable leeway to determine just what it is in a particular situation. So you get one result in one state and another result in another state, and even within the same state you can get one result in one court and a different result in another court. So don't approach lawyers and don't approach the law with the attitude that they have definite answers. They don't. Rather, we have a process which is available to both sides.

I'd like to emphasize what the decisions in the areas we're talking about are really saying. They aren't saying that it is the business

of the courts to determine these questions. What they are saying is that administrators have the initial power to make these decisions, and that they have considerable leeway in which to make them; also, that students still have rights as citizens under the Constitution, and school administrators don't get the final say on whether their regulations, or on whether their actions are final. There is a power of appeal to the courts and it may be that administrators are going to have to justify the rules under which they operate. The courts aren't saying that you can't make these decisions; they're saying basically that the decisions have to be reasonable.

Now I'd like to make just one final point, and that is that the judicial reactions to these kinds of problems vary from time-to-time. There is a swing of the pendulum in the school rights area just as in the economic rights area, and around the turn of the century we got a whole flock of school cases in which school administrators were being overruled on the basis that they were acting beyond the scope of their authority. I think this is very interesting because practically all of the current decisions have been concerned with the due process, freedom of speech and expression, and the right to privacy concepts found within the First and Fourteenth Amendments to the Constitution. In part, this is because much of the current wave of court decisions in the school area stems from racial questions since we were using the Bill of Rights approach in that area and the courts tended to carry the concept over into school cases. But seventy-five years ago the courts were approaching the school cases from the standpoint: "You are going beyond the

scope of your authority as school administrators only to adopt decisions which are reasonable in the light of your purpose which is to educate children. When you go beyond what is reasonable in connection with educating children you are exceeding the authority which has been conferred upon you by the legislature." There is, therefore, a clear and distinct difference between the kinds of school cases before the courts of yesteryear and those of today.

Now in the interval between these two times, by and large the courts were not having anything to do with school cases. What they were really saying was: "We trust the administrators, they have the final power; they know more about educational processes than we do. They are a body of experts, so we're going to defer to their judgment. We're not going to question them. They, in effect, have final say-so." Simultaneously, the courts were using the same approach with governmental administrative agencies. They were saying: "Your administrative agencies are specially created; you're experts; you know more about this than we do, so we are not going to wrestle with these problems because the legislature conferred its authority on you and its your baby; you know how to handle it better than we do."

But the courts and the people came to distrust the administrative agencies. And with the recognition by the courts that the administrative agencies didn't have all the answers, the administrative decisions were increasingly challenged. Administrators were told that they had to justify their decisions. The mere fact that one made a decision didn't

make it right, and the courts were going to take a look at it to see whether it could be justified on any reasonable grounds.

The philosophy of questioning administrative decisions has carried over into the school administrative area, and again in part because of the distrust of educators. The argument runs something like this: "You aren't doing a very good job; you aren't educating our children properly, so it's obvious you aren't the experts that we thought you were and we're going to take a second look at your decisions. You don't have all the answers, so we're going to subject you to exactly the same kind of criteria to which we subject anyone else. You're going to have to justify--to prove--that there is some reasonable relationship between the rule you have adopted and your educational purpose."

QUESTIONS AND ANSWERS

Question:

> In the due process area where the parent has the right to question witnesses, the principal also has a moral responsibility toward the witnesses. Maybe this witness was a small youngster and the accused was a big guy, and he knows that he'll probably get beat up. Where does the principal enter this? To me, if you're going to stop this thing, you have to get at the person who is provoking it and we do have a moral responsibility.
>
> I have another question I would like to ask in connection with this. The right to counsel--does that counsel necessarily have to be a trained person, a lawyer, or can anyone in the community appear to listen to the accusations?

Answer: (Hillman)

I'll just take a shot at it. In the first place, I don't really know what "moral" means, and sometimes you get into trouble with it. But I don't think that due process would negate your

getting at the root of the problem. I think what you're looking for as an administrator is to try to get at the root of the problem without depriving someone of his rights, and to try to make sure that it doesn't happen again. That's what I always try to do--have a fair process. The difficulty with due process is that it make it difficult in the normal kinds of operations in which you're involved, to get underneath and dig out that information. You see, it was much easier to say to a student, "Why did you do it?" But that approach made it clear that he was guilty before he was proven so. I think that what an administrator has to do is to develop almost new approaches to finding out who the other culprits are, and I don't think that the courts are going to be so concerned with minute details if they see you have made a fair kind of attempt to get there. And the other point that should be made is that the courts decide on the questions they are asked. Remember that! If they are asked a question, they decide on that question. They don't go over in tangential areas and make decisions relative to that.

In answer to the second question, as far as I know the third party should be somebody who has legal knowledge (if you're going to go into court). Can someone else defend you in court? I don't know about that. I would think that they possibly could, and I know that there are new processes being considered. Our courts are bogging down with everything that they have to do, and this is one of the concerns about it. The ombudsman approach is

one that's being considered whereby a person is trained to be an intermediary to help resolve some of these cases before they ever get that far.

Question:

I understood the right to counsel question to refer not to court process but to some kind of administrative hearing in the school system. Suppose I suspended a youngster for one day. Does he have the right to bring a person to the hearing with him, or can I just deal directly with the parent?

Answer: (Lacey)

I can't give you any definite answer. As I have already indicated, we don't have all the answers. To the extent that there is due process required, the student has a right to have someone represent him in this kind of situation. My answer is that at that level he could be a person of the student's own choosing; it doesn't make any difference whether he's a lawyer or whether he's somebody else. Now if we get into court, we get into a different problem.

Answer: (Hillman)

I think, though, that this is the same thing that could be established in your school policy. I think you would be safe with that--to say as a matter of school policy who could represent the student in administrative hearings.

Question:

To me, the parent should be sufficient, if it's a minor matter.

Answer: (Lacey)

Well, realistically this is not so because of two things: (1) parents are very emotional about these situations and they may not be capable of being objective, and whoever represents anybody in this kind of situation needs to maintain a degree of objectivity; (2) the illustration given a moment ago, in which the witness testifies he is going to be beaten up, is true sometimes, and even at the college level where I am involved in disciplinary procedures, I see it as a very real problem. But there is also the problem of the lying witness; the person who comes in and lies about a particular person because of a grudge--maybe because he's been beaten up in the past, but for some reason he is lying. One of the purposes of this examination is to detect lies, and you need someone with a certain degree of skill in detecting a lie. Very frequently the parent wouldn't be much help.

Question:

In this matter of student rights, it seems to me that we are assuming that our students are on the same developmental level. This can be pretty complicated, depending on the level on which the student is functioning. Who determines this level?

Answer: (Hillman)

I'll try to answer that in respect to what I have seen. I don't know a definite answer to it, but I think what's happening thus far has to do with rights at the high school level; that's mostly where we are. There is some action at the junior high level, and in very rare instances you'll find some in what we call the upper elementary, or maybe middle school, but it's mostly at the high school level. I don't think, though, that it would just apply to the people in the high school. I just think that's where the activity is thus far.

On the question of who determines the level of functioning, the student is still a person who has rights given to him under the Constitution of the United States. The Constitution says that the state may not deprive him of certain activities (Fourteenth Amendment), and he has the right to find it out if he is deprived. But then it is someone else's job to determine whether you were fair with him or not. Whether you have made arbitrary decisions that are not fair with him is really the question. So, I don't think that it necessarily has to do with age, although in years past we believed that when a kid got to a certain age--was it twelve?--then he reached the age of accountability. Parenthetically, we now have an eighteen years of age law in Michigan which we call the "right to do anything" (or "everything") law. This means that if a student goes out a lunch and has a beer, he has that privacy as long as he doesn't come back drunk and you have

to put him somewhere for the afternoon. I guess that it applies to everyone.

Question:

Traditionally, athletic coaches have had as much control over students as anyone else it would seem. Just how far can a coach go with respect to having a student keep his hair cut at a certain length, etc.?

Answer: (Hughes)

Well, clearly he can't deny the student the right to participate in an activity if it's a part of a regular school program in which all youngsters are allowed to participate. Now the extent to which a coach in any particular part of the world can get away with that kind of arbitrary rule does at times depend upon the local tradition and the local court. That is to say, there are courts which tend to be more conservative than others, but, as a strictly legal matter the coach cannot deny the youngster the right to participate in that activity because of his hair length.

Answer: (Hillman)

I wouldn't depend too much on the conservative position of a particular court, however. One can always go to a higher court, and if one continues to go to a higher court he's going to find a court that's not conservative. Too, I believe that today the judges are in contact with each other more than they used to be. I think they're even in contact over the telephone at times. I just wouldn't depend on a court to be conservative.

Question:

How do you distinguish between rights and privileges?

Answer: (Lacey)

Again, there isn't any firm answer. You can't distinguish between a right and a privilege until the judge labels them one or the other. I think increasingly it doesn't make any difference, however. There are a number of Supreme Court decisions which have said that this little right/privilege dichotomy is no longer useful. Even though we label something a privilege, the right to due process remains in connection with it. We used to talk about this in connection with a variety of things--like the right to work for the Government, the right to get a driver's license, and things like that. We used to say that we can do whatever we want to in connection with this because this is a privilege rather than a right. But all the recent decisions have said that it doesn't make any difference what label is attached to it, because if the Government has the power over it, it has the responsibility of applying due process to it.

Answer: (Hillman)

Let me just relate to another word we use when we talk about rights. This is human rights. We don't use the term very often, but it is now being used in some of the discussions in the courts. Human rights are a combination of rights due people through the law, through nature, through tradition, and through

which a person has a just claim as a human being. I have often said that the era of the sixties was the era that dealt with legal or civil rights. I think that in the era of the seventies we're going to be in a new area called human rights. It won't be a sudden transition, but I think we're going to see more reference to human rights or law to which a person feels he has a just claim. It's difficult to delineate between privileges and rights.

Answer: (Lacey)

I'd like to add a word about the use of the courts. I, personally, am appalled by the extent to which we have turned to courts to solve our problems. Now I blame not merely the students, but I blame the administrators because there is a very real tendency, not merely in the school area but in many areas, to say that we don't have to worry about a problem because it is going to end up in the courts anyway. And I can just see a school administrator saying, "Well, I may be a little bit wrong on this, but if I am I'll get sued and some court will set me right." I think that we're all--in varying areas--tremendously guilty of this and it's a very said situation because even though I'm a member of the legal profession I don't think that courts have any special competence to deal with these problems. I think the courts know they don't. They're dealing with these problems not because they want to do so, but because they are literally the

last resort and they have to deal with them. Let's try to get away from utilizing the courts to solve problems that aren't really any business of the courts.

Question:

(a) I'd like to ask a question about the confidentiality of school records. (NOTE: This is a guidance counselor speaking.)

Answer: (Hillman)

I think that you are talking about releasing the student's record to the student. Right?

Question:

(b) I'm talking about these other people such as the FBI or Civil Service people who come to the school and want to see the records of a particular student. I have a great deal of misgivings sometimes about letting somebody see a student's school records. Besides, I don't know whether they can properly assess the records. I don't know whether I should release it without a written consent, etc.

Answer: (Lacey)

This is perhaps not a pracitcal solution, but the best advice I can give you is that if you choose not to release a student's record, then it will be up to the person(s) requesting it to get a court order to compel you to do so, and they will have the burden of going to court. Now, I've just said let's not go to the courts to solve this problem, and I think that an attempt should be made at the school administrative level to work out a solution to the problem, but if you have serious doubts in a particular situation it seems to me the only solution is to wait until you are ordered to produce it.

Answer: (Hughes)

There has been some legal activity with respect to the confidentiality of student records in higher education. It is fair to say that it has been held generally that it is the student himself who has the right to decide whether or not anyone else should see his records.

Question:

In California there is a case that has to do with using IQ's for student assignment to classes. Do you know if a decision has yet been made?

Answer: (Hillman)

No, I don't think so or there would have been a lot of noise about it. I feel that when the decision comes down it will say that it's not a reasonable activity. I think the court will say that it is a political activity which is determining where one will be in society in the future; therefore, it is making determinations about him as a person. It's really earth-shattering because the tracking activity has been shown to predetermine that one person will be a lawyer, or a doctor, and that this other person will be a garbage collector. Therefore, the process of tracking determines one's future position in society, and in doing so you deprive him of his right to make some choices about his career. However, I think the decision will say that you can give advice about selection of classes or tracks.

There are a lot of people in Civil Rights activities in this country that I know and have worked with who are continually saying to students, "Do not take the general course; don't let them talk you into taking the general course. The general course prepares you to do nothing." I know that they're predicating their actions on the belief that the school should tell a student what it seems like he should do on the basis of what it knows about him so far. And the school really, I think, would have that kind of information but the other activity (tracking) says, "You are apportioning and developing levels in society and the school really shouldn't be involved in that." I believe that that's the way it will come out.

Question:

Concerning the rights of students, have any rights of the school been defined to the extent that it can or can't proceed along certain levels? For instance, does a school have a right to teach a course a certain way?

Answer: (Hillman)

Well, as I said earlier, if you have power and then give it up, you don't have the right to it any longer. The line between administrative and student power (and/or rights) is being drawn more nearly in the middle and I think the school has a right to determine a lot of things that it has been determining, e.g., school hours, the schedules, etc. A lot of things have been pretty well left to the school. However, what's typically left to the school is what nobody else wants. The selection of principals is

as an example. I know a lot of cities where the people say they want a principal who relates and a principal who can do this and do that; they want to make the selection. Well, that was very popular about seven years ago, but now those people who selected a principal are catching all kinds of feedback because the men they selected aren't any better than the ones that were there before. So now they say this: "We have selected down to the last three and we want you to have the responsibility for picking out one of the three." I think the people are realizing that the delivery systems are still there and that you have to find something to do within that delivery system to adjust it. I think a lot of things are still left to the school.

Question:

Say that you decide to teach a course that requires reading, and a non-reader decides that this is a part of the curriculum that he wishes to have, are you to alter the course to meet the non-reader or do you have the right to teach it with the requirement of reading? Measuring reading level is another way of evaluating the IQ of a student, if you want to get on that.

Answer: (Hillman)

Well, the most recent development in IQ's that I've seen was done in medicine using the strobe. Have you seen the study? Out in the Northwest part of the United States, doctors are working on a process of determining IQ's by measuring the reaction time and the return time as a light message is flashed to the brain. IQ's determined in this way would have nothing to do with the cultural or social kinds of things which are not answered in

conventional tests. I think that might be the answer for us. In the part of your brain they're talking about, there are certain fibers along certain nerve lines that might eventually even be shredded to cause people to be brighter. It would be real helpful for us in schools.

To the point of your question, I think that you still have the opportunity--if you want to--to teach a class that requires a certain competency before a student is admitted into the class. I think you also have the other responsibility of finding ways to help students who need to be in those classes or who want to do something that that class would help them do. The question is, "What is your real goal in setting the admittance requirement? Is it to deprive, or is it for some other reason? Is it, for instance, the only way to do it? Do you have other activities to enlighten the student?"

Parenthetically, we've found in studying Head Start and similar programs that in the process of retrieving a kid, we know that he's experiencing certain socializing activities in the program, but we don't know what he's missing. We begin to realize what such students are missing only after they go through it. You can then see certain kinds of deficiencies, and those people with such deficiencies then become social deviants. They can be social deviants of the law (and wind up in prison), or of the school (and wind up in remedial classes). You can name it. After we go to a social deviancy activity and try to resocialize

those people, do you know what our success has been thus far? Oh, it's been fantastically low. We've dropped millions and billions of dollars into resocializing people who haven't been successfully resocialized. I mentioned a case in California where the student went out and took the tutorage arrangement, and then came back in and passed the test. The judge said, in effect, that "Your responsibility is to educate that child so that he might participate in this society."

Question:

Well, who's going to determine when a kid has an education--the student, his parents, the judge?

Answer: (Hillman)

The whole approach of behavioral and/or performance objectives is oriented toward answering the question of what constitutes an education. School systems throughout the country are working on this problem and they may provide the ultimate answer. Even then, I'm not sure I want educators to be the sole determiners of what an education is. But the school certainly needs to make some early determinations about what the child needs to be able to participate in society now and in the year 2000.

However, until we have the answers to these questions, who is to determine when a kid has an education? If the judicial branch of our Government has a chance to look at such questions under the laws and statutes and under the Constitutions of the states and the United States, then they will have the final say.

Question:

I'd like to get back to the dress codes for a minute. The speaker this morning said that certain speech and/or dress is illegal if it is obscene or disrupts the educational process. How far can, or should, school board regulations go? How detailed should they be?

Answer: (Hillman)

Let me say that the last part of what he said, in my estimation, is the one the courts are going by more. Is the action disturbing the process? What is obscene? There is no kind of boundary for obscenity because it is one thing in one location and another thing in another location.

Answer: (Lacey)

I'd like to make this additional comment. The different results you get between the cases that say there is a right to have long hair and the ones that say there isn't depend upon whether a court takes the educator's word on whether it will be disruptive or not. They all concede that if it is disruptive, then the school has a right to regulate. But the cases that have said that the school has a right to control the length of the hair, also say that the school administrator has testified that the length of hair would be disruptive. But the cases that are going the other way, i.e., say the school does not have the right to control the length of the hair, say that school administrators say that it would be disruptive, but that they haven't introduced any proof that it would be. They haven't convinced the

court that it would be disruptive and they have the burden to do so. Until they establish it as a fact then they can't regulate it. So that's the line that the courts are working on now. It is simply the question of some courts taking the word of administrators and of some others challenging the word of the administrators, but they all agree that if it is disruptive then the schools can regulate hair length.

Answer: (Hillman)

I'd like to say one other thing on this question. I think the school has a responsibility to take a position on dress codes, four-letter words, and the like. I think administrators are abdicating a major responsibility if they don't take a position on what is reasonable for a community, rather than for themselves as administrators. They need to know what their communities feel they want to do. That's the reason I think that you have to take a position. I think that you've got to know what a community feels on the issue and take a position, in court if necessary, accordingly. But don't let the position reflect only your own beliefs.

Question:

Does a student have the right to forfeit a right? For instance, when I call a kid into my office and say something like this: "Now, you have the right to counsel, but do you want to forfeit that right and do something else?" Can he forfeit that right?

Answer: (Carr Lowrance)

I'd say, basically, that he wouldn't--that you'd be better off to follow all procedures; there's really nothing that you can gain by adhering to such a procedure. Your safe position would be to carry through with all rights.

Question:

Every group in the public seems to be lined up against the police and the school administrator. When is somebody going to give the administrator some rights?

Answer: (Hughes)

I think it's very easy to become somewhat paranoid as we see this group and that group doing what appears to be "whittling away" the rights of administrators to perform and execute their responsibilities. I think, however, that the temper of the times is such that there probably has been no other time in history when there has been the great consciousness that people have of their civil rights.

There have been from time-to-time, transgressions of what we consider to be civil rights of people. We have oftentimes, I think, behaved as administrators in loco deo rather than in loco-parentis, i.e., we have behaved from time-to-time as judge, jury,

and prosecutor, in dealing with children. I think that we're going to have to be conscious that we cannot behave in this way. The courts are not going to permit us to do so. I think that the child has a right to have a third party present in a disciplinary action. And I don't think too many principals are frightened about that because they're not behaving in such outrageous ways that they're going to injure themselves by allowing third parties to be present.

Question:

I mentioned this morning that we're coming to the situation where we have parents at opposite extremes on the issue of the rights of their kids in the same school. One set of parents comes in the morning and climbs all over me for letting the kids run the schools; another comes in the afternoon to tell me that I have no right to control their offspring. And they're in the same school.

Answer: (Hillman)

I think we have another polarization, too, which is even more distinct today and that is that not only do you have those two polarizations with parents, but you have the parents versus the student. I think that's even more acute because there are students who are talking in one direction while their parents are talking in another direction. The administrator is caught in the middle of that. The most interesting activity within the student rights center I mentioned is that of getting students and parents together to agree on something. The administrator can just stand back and watch a little bit of that and learn about the kind of

situation he is in because the question must be asked, like the speaker did this morning, "Does the school belong to the students or is it for the students?" He took the position that it would not bother him either way, but I see a definite difference between the two positions. I think the students are maintaining that the school belongs to them, for without them there wouldn't be any activity. Some parents support this idea. So I am saying that that's another dilemma.

Answer: (Lowrance)

In some of our school districts in Mississippi where due process procedures have been implemented and placed into the code, we find that the machinery for discipline and student order, student expression, and contribution in class is greatly enhanced. Greenwood, Mississippi, as an example, has found this out. There seems to be a feeling among educators that you're losing something, but I really maintain that you're gaining something when you give something that is just in being given and that it works to your advantage as well as to the student's advantage.

Question:

There was mention earlier about the family which had the costs of a tutor paid for by the principal. No mention was made about class size, type of curriculum, etc. I'm wondering whether a judge would have the competence to make judgments about these things?

Answer: (Hillman)

First of all, the courts will only answer questions that they're asked. A lot of people believe that the courts make explanations of things beyond the law, or beyond what is asked of them. I think that I am correct in saying this--that the court is asked a question and the judge tries to answer that question in terms of what the law, or his interpretation of the law, says. Now in the particular situation we're talking about, I think that the judge was saying, "You have decided that you can give an education to these people in this kind of setting; you and the teacher agreed to that." That's a keen point because I think we have not yet determined what an education really is. I think the judge said, "You have accepted the responsibility to do this, and if you don't want to do it that way you should have said first of all that you can't accept it under those conditions." You shouldn't say you can teach fifty kids in a class and give them an education if you can't. You shouldn't say that! You should say, "I am a professional; this is what it takes for me to do certain things." Be specific!

Question:

In the few decisions I've read, I have yet to find one where the controversy, whatever it might be, caused an interruption of the educational process in which the court didn't uphold whatever action was necessary. Are there any?

Answer: (Lowrance)

We had two cases in Mississippi with similar backgrounds and similar questions. In one, Burnside v. Byers, the armband question was raised (it involved Snick armbands), and the courts upheld the students' right to wear the armbands because the board was unable to present any kind of proof that there was disruption. The board tried to say that they anticipated trouble, but they failed on that point. In another very similar case, also involving a Snick armband, the board demonstrated actual harm to the educational process. There was force in implementing the wearing of the armbands, and thus they were upheld. It hinges on that one small point: anticipation rather than proven.

Answer: (Hughes)

It also gets into the matter of whether or not the administrator behaved in a capricious way and behaved in a way which the courts would deem to be unreasonable, or in a way in which a normal human being would not behave. I think where a lot of administrators meet difficulty is in the absence of understood and reasonable policy. "Understood" means that the students have access to the policy, understand the rules, and keep reasonable behavior and activities. Oftentimes principals have been caught in a bind by not having a set of rules, reasonable or unreasonable.

Answer: (Hillman)

I think our speaker this morning brought another unfortunate thing to our attention. A student will come in with fifteen demands and the principal will just abdicate all responsibility and say, "Take the keys; here's the broom; turn out the lights." I believe that we should not have the courts answering so many questions for us. I am saying that I think we should not ask the courts for all these decisions; I think we should try to handle these things ourselves.

What I am saying is that I don't think we should always go to the courts. I don't think we should abdicate our responsibility. I think we should be aware of what's going on, and that we should say things along the line of what's going on, but we shouldn't just all of a sudden let somebody come up and say, "this is the way it's going to be," and be frightened by somebody taking you to court. Lawyers have intimidated principals, lawyers have intimidated administrators because of the fact that if you don't know the law and you're not comfortable with it, then somebody who does know it and is more comfortable with it can intimidate you. That's been the past history of this thing.

Question:

You talk about rights and responsibilities. You say everyone has a right to an education, but what are the responsibilities of the student toward his education? At what age is a citizen protected by the law? Once a judge has made a decision, whether he had been in school or not, it is looked upon as a precedent. Can it be changed?

Answer: (Lowrance)

Your last question first. It can always be changed by a higher court which provides a more weighty precedent and it, of course, can go on through the appellate structure where it may ultimately reach the Supreme Court. The precedent is established there; then, of course, it reigns throughout the land.

You mention again, it seemed to me, that you favor a somewhat peculiar system of justice for the juvenile, and that is how the court expressed it in Gault, I believe. In Gault, a juvenile was incarcerated under a juvenile code of Arizona without any constitutional guarantee whatsoever. He was, in effect, just "put away for his own good," but the court said, "Well, really, was that for his own good?" I think it helps in perspective if you look at yourself and remember that this has happened to adults in a great number of lands throughout Western culture. You have to draw the line somewhere. I think I'd much rather someone drew the line far beneath me and made it inclusive of students in order to further protect me than to begin drawing it up on through age eighteen, or what have you.

Another thing, there are correlative rights and responsibilities and I'd say that the Supreme Court, beginning with Gault, is promulgating this doctrine definitely as rights are extended to the students. There are rights now to not abuse these rights, so that the student is not only a citizen granted rights by the Constitution but he is a citizen of the Constitution with

correlative duties to society. For instance, libel, slander, free speech or assembly, breach of the peace, etc., come right back on the student if he should abuse these rights. He is being made a creature of the Constitution, so to speak, as are adults.

Question:

You're speaking of the eighteen-year-olds now?

Answer: (Lowrance)

No, I'm speaking of all students above or below eighteen years of age.

Answer: (Hughes)

For example, an underground newspaper written by a student prints inflammatory statements. The student is liable for that just like anybody else would be liable for making inflammatory statements about anyone.

Question:

I'd like to pose another question about the third party--the ombudsman. You set up the third party as a counselor. My question is do I, by law, have to listen to this third party or does my principal have to listen to this third party if we don't wish to do so?

Answer: (Lowrance)

No, you don't have to listen. It has happened that cases are overturned because there is not counsel provided or permitted, but there is no solidified cohesive rule which you could say applies to all cases. And in most cases, demurred appearance of

counsel in an advisory capacity is all that it permitted by school boards and this is held sufficient. But they should be present.

What I am saying is that it is not required in most cases that you or the board even hear counsel. But you'd be on far better footing if you did; you'd have nothing to lose by it. At least, you should permit his attendance in an advisory capacity.

Answer: (Hillman)

I think that's a key point. I really think you'd be in better shape if you had the counsel in whether he's a lawyer or not. The counsel does not direct the activities. He's there as an adviser. What we're talking about is a grievance procedure. If you had the counsel in, the counsel doesn't have to agree and you don't have to agree with what counsel says. The point is that counsel gets a chance to hear what's going on and his advice is to the parent, not to you.

Question:

Even if his advice is not to listen to anyone else?

Answer: (Hillman)

OK. Then I think that at that point the courts are the last resort. The grievance procedure should lead to a place somewhere along the line that would circumvent the need to go to court. The idea of the ombudsman, as in this case, would be to circumvent having to go to court. A lot of these cases have been settled to

the satisfaction of the principal, the student, and the teacher. So if you say to the people somewhere in the grievance procedure that you'll let them bring counsel with them, I think that you have outlined a wise procedure. It might be best along the line somewhere to specify a place where counsel could come in and advise the parents. If the ombudsman, or counsel, is noisy and if he insists that he's going to tell you what to do, you can say at that point that this will not work and you can terminate the meeting. I used to do that. When a parent would come in and when it came to the place where any kind of session was do disruptive that we could get nothing done, I would say, "Let's cut it off and meet some other time, perhaps at a more private place."

You should have in your policy a very clear planning in your grievance procedure as to where counsel could come in and as to what counsel can do. Otherwise, a lot of people will come in and will think the principal doesn't know what's going on--or the superintendent doesn't--and they'll push you around. A lot of times this happens. The point is not to be intimidated by it.

Question:

I'd like to come back to the area of a student being dissatisfied with his progress in class. The principal, as I understand it, stands responsible for his teachers, yet the teachers hide behind a tenure type thing and the only way I know of that a teacher can be removed is if God, himself, were to strike him dead. Without this happening you go through a two to three years documentation process. It's a fantastic procedure to get rid of a dud teacher. And yet it's the principal's duty to do this. Now I think that there probably needs to be some work done in the area of tenure, don't you?

Answer: (Hillman)

There is work being done in the area of tenure and I can tell you that in the major cities in this country you don't have "tenure" very long if the parents want to get rid of you. They simply get rid of you. It usually comes from having your tires slashed or having the top cut on your convertible, or whatever, but you won't stay around very long.

That's one way to get rid of tenured people. I don't know that it's the best way. But I've heard a lot of principals say it seems to be the only way.

I know one other thing--that there are many legislatures now that are considering very carefully the process of doing away with tenure laws. The only problem there is having to fight with the American Federation of Teachers and education associations.

Question:

I would be against doing away with tenure. The thing that's wrong with the tenure law is that it is improperly written. Surely we must have the intelligence to phrase a tenure law where it will protect the teacher that's doing the job, but would allow us to get rid of the one that isn't. Wouldn't you think so?

Answer: (Hughes)

Part of the problem, I think we have to agree, is that we, as administrators, aren't very good at keeping personnel files in the kind of shape which would give us the evidence needed at that critical time when we need to dismiss a teacher. I grant that the area of teacher evaluation is a very nebulous one, one that is

hard to attack. But I don't think we have done a very good job of putting together the kinds of historical evidence needed at the critical times.

Question:

What do you know of in-school suspension? What is the status of that?

Answer: (Hughes)

I don't think that there is any legal status--I don't think it has ever been litigated--but in-school suspensions are more and more characteristic in certain urban areas. And it seems to make sense.

Question:

I was thinking particularly of a situation where a pregnant girl came back to school and was denied physical education.

Answer: (Hillman)

The only reason, if a girl comes back to school, that you can deny her the right to participate is concern for her health. Suspension can't be based on the fact that someone is making a moral judgment on whether a person who is pregnant should participate in sports. It has to be based on a judgment on the fact that the school cannot accept responsibility beyond certain stages of pregnancy for health and safety in the participation. I know this is one on which I have seen a lot of principals stand up and say morally, "I don't believe a girl who is pregnant should be in school. I just think it's the wrong thing to do; my Christian

background tells me that." Well, the judge will say to you that this reasoning doesn't apply here--that you're depriving one of the right to an education. I think that the schools now allow five or six months before they exclude a person. But even after exclusion they are given home instruction.

Answer: (Hughes)

Could I respond to this question? Certain principals in many cities in this State are using the in-school suspension, basically, so as not to release the child to the home when there to release him to. In a sense, out-of-school suspension abdicates the school's responsibility to take care of children between certain defined hours during the day. There is also a time with some youngsters when they need to be removed from the regular school operation because they have been behaving badly, or for some other reason. Some schools have, in effect, created a kind of quarantine area where the student is sent. I think that a case may get into the courts if the place to which the student is sent is viewed as being cruel and unusual punishment. I know of one instance--I won't identify the city--where the principal has a place they call the "hole." It's in the basement of the school and it's dark and dank. I think that the courts would clearly rule against this sort of in-school suspension.

Summary: (Hughes)

We have covered much territory in the past hour and a-half. In summary, I think clearly that we have come through an era where principals, administrators, teachers, and school board members have behaved not in loco parentis, but rather in loco deo. I think we are now paying the price for that behavior. If I hear Larry Hillman, Forrest Lacey, Carr Lowrance, and Joe Cook correctly, I hear them saying that administrators do have rights, that schools have rights, and that school boards have rights. But they are saying that we should make those rights consistent with reason. Let's avoid capricious action; let's avoid action on dress that more often disturbs the principal rather than the educative process. Let us confess that more principals have been disturbed by short skirts than has the educative process been disturbed. I am certain of this. Let us not continue the habit of sending our principals around measuring skirts or measuring the length of hair over the ear. There are more important things for principals to do.

I think, therefore that given a considered body of reasonable rules, and the reasonable application of these rules, a principal need not fear he's going to be sued for his car or his house. Many school matters will continue to be litigated, of course. We live in a society now which is increasingly aware of citizen rights. Let us confess, too, that oftentimes we have not behaved in ways consistent with our stated beliefs about human rights; that this has been especially so with respect to the little people we are charged with educating. At times, we have subjected youngsters to cruel and unusual punishment; I think we have to

admit that. I think the beacon light is on such behavior. So, given a reasonable body of rules and policies, given the judicious application of these rules and policies, and given the openness of these rules and policies--with children aware of what the rules are so that they can be held accountable to them--I think we will have a truly just school.